No. 226.

Brf. of King & King for P. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK,
Plaintiff in Error,
v.
THE UNITED STATES.

No. 226.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

Submitted by
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for other Interested Parties.

IN THE

Supreme Court of the United States.

October Term, 1900.

FRANK M. FAIRBANK,
Plaintiff in Error,
v.
THE UNITED STATES.

No. 226.

Brief of George A. King and William B. King, Attorneys for Others Interested in the Contentions on Behalf of Plaintiff in Error.

The conviction of the plaintiff in error in this cause for failing to affix the stamp required by the provisions of the War Revenue Act of June 13, 1898, to a bill of lading for certain goods accepted by the Northern Pacific Railroad Company, of which he was the agent, for transportation to a foreign country raises the question of the constitutionality of the following provision, constituting a portion of Schedule A of that act, 2 Supp. R. S. 792; 30 Stat. L. 459.

"Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

We insist in support of the plaintiff in error, that this provision is in contravention of the following clause, constituting a portion of article 1, section 9, of the Constitution of the United States:

"No tax or duty shall be laid on articles exported from any State."

It is insisted that this tax, though nominally on the bill of lading, is, by reason of the fact that it is laid upon a necessary concomitant of the exportation of goods, in effect a tax upon the exported articles themselves. This was expressly so decided by this court in the case of *Almy* v. *California*, 24 How. 169. This case, it is true, did not arise under the clause of the Constitution prohibiting Congress from taxing exports from the States, but upon the other clause providing that no State shall "lay any imposts or duties on imports or exports." A statute of California was under consideration in that case imposing a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State of gold or silver, in whole or in part, gold dust, or gold or silver in bars or other form. The court, after remarking that "If the tax was laid on the gold or silver exported every one would say that it was repugnant to the Constitution of the United States," proceeded (p. 174):

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing: for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purpose for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writ-

ing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States."

The court, therefore, held the tax to be one prohibited by the Constitution of the United States because a tax on the export.

This case was decided in 1861. It has always been regarded as authority, and has been referred to and followed in many recent cases.

In the case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647, which was decided in 1888, it was referred to with approval. In that case the agent of the Western Union Telegraph Company at Mobile was prosecuted for refusing to pay the annual license tax imposed by city ordinance on all telegraph companies. It was held that as a large proportion of the business of the company consisted in sending interstate messages it was exempt from taxation on those messages by reason of the exclusive power on the part of Congress to regulate interstate commerce. It was said that a tax on the occupation was in substance a tax on the business, and that the variation of the form did not affect the substance.

In the first of the two opinions delivered on behalf of the majority of the court in the *Income Tax Case, Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, the court referred to this same Almy Case and others involving the same principle in the following language, which seems quite applicable to the tax in question here (pp. 581, 582):

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing a forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure, but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and *Leloup* v. *Mobile*, 127 U. S. 640, it was held that

a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698."

A tax on a bill of lading is, therefore, in substance, a tax on the articles covered by that bill. If a tax on the articles themselves falls within any constitutional prohibition, so must the tax on the bill of lading.

In the enactment of the internal-revenue laws Congress has respected this principle to such an extent as to exempt from taxation goods which are exported, even though subject only to precisely the same tax as those manufactured for domestic consumption. This is done by the allowance of drawback of the internal-revenue tax by §§ 3329, 3386, 3441, etc. of the Revised Statutes. There is some little question whether Congress was obliged to grant any such drawback under the constitutional provision for the reason that the internal-revenue laws, so far at least as concerns distilled spirits, provide, Revised Statutes, § 3248, that "The tax shall attach to this substance as soon as it is in existence as such." Hence, if the tax once attached, it might be questionable whether it could be afterwards avoided by a subsequent exportation, particularly as no provision of the internal-

revenue laws has ever taxed an exported article of domestic production simply because it is exported, as does the provision in the War Revenue Act now under consideration.

This question came up in the case of *Thompson* v. *United States*, 142 U. S. 471, which was a suit brought by the Government on a distiller's bond where part of the spirits were lost by evaporation between the time of the original distillation and the time of exportation. It was held by the Supreme Court that the quantity to be exported must be determined by the regauge at the time of the exportation, and that, as by § 3248 the tax had attached to the spirits originally produced at the time of such production, there could be no escape from the payment of the tax on the difference between that amount and the amount exported, as shown by the regauge at the time of the exportation. Hence, as no attempt was made to tax the portion which was actually exported, the Supreme Court said (p. 478), "We do not think that the constitutional inhibition against the taxation of an article exported from any State is drawn in question." There is, however, a clear intimation that the Supreme Court at least thought that there would have been considerable question of the right of Congress to tax exported spirits, even though taxed at the same rate imposed on spirits not exported.

The proposed tax, however, on foreign bills of lading presents a far stronger case of violation of the constitutional prohibition than would an attempt to enforce a tax on exported distilled spirits. In the latter case the spirits would be taxed only in the same way and to the same extent as other spirits of domestic production, and the tax would not be laid on them because they were exports.

In the present revenue act it is true that there is also a tax on domestic bills of lading by a provision immediately following that on foreign bills of lading. The tax

on domestic bills of lading, however, is only one cent, while on the foreign bills of lading it is ten cents. Looking, as the Supreme Court says we must, at the substance of this tax, rather than at the form, there is one tax imposed on every package of goods shipped from one point in the United States to another in the United States, and another tax of ten times the amount on every package of goods exported from the United States to a foreign country. Granting that Congress may constitutionally tax the transportation of goods by imposing a stamp duty on bills of lading, it certainly can not discriminate against exports by imposing upon bills of lading for exported goods a tax of ten times the amount of that imposed upon shipments from one point to another within the United States. To permit this would be to allow a discrimination against goods because they are exported, thus violating the constitutional prohibition of taxes or duties on exports.

We also claim that the discrimination made by the concluding proviso of Schedule A in favor of the ports from which vessels are dispatched to ports of British North America renders the entire tax on bills of lading unconstitutional. This proviso is as follows (2 Supp. R. S. 795):

> "That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

But by article 1, section 8, of the Constitution of the United States it is provided that "All duties, imposts, and excises shall be uniform throughout the United States."

And by article 1, section 9, "No preference shall be

given by any regulation of commerce or revenue to the ports of one State over those of another."

These clauses were to some extent considered in the case of *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* 18 How. 421, where, after quoting these clauses, it was said (p. 435):

"As to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another."

Now in the present case there is a direct preference given to those ports from which goods may be shipped by water to British North America over ports or places from which similar goods can be exported only by land. There is also a complete lack of uniformity between the duties imposed in one port of the United States and those in another. How, therefore, can it be claimed that the clause in question conforms to the constitutional requirement of want of preference, or to that of uniformity?

On both grounds, therefore, the clause in question must be held unconstitutional and void, and the conviction of the plaintiff in error should be reversed, as based upon an unconstitutional statutory provision.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for others interested in the contentions made on behalf of Plaintiff in Error.